

August 04, 2016

EDWARD J. EMMONS, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

Signed and Filed: August 4, 2016



Dennis Montali

DENNIS MONTALI
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re) Bankruptcy Case
KRISTINA MARIE PEREZ KROW,) No. 12-31601DM
Debtor.) Chapter 7
_____)

MEMORANDUM DECISION ON MOTION FOR RECONSIDERATION OF
PRIOR CONTEMPT RULINGS

On July 8, 2016, this court held a hearing on the motion of Kristina Marie Perez Krow ("Debtor") for reconsideration of an order entered on June 1, 2015, denying her second motion for contempt against Len Nordeman ("Nordeman") and Montgomery Sansome, LP ("Montgomery Sansome") (collectively, "Respondents") for alleged violations of the automatic stay and discharge injunction. Previously, the court had granted in part and denied in part one contempt motion, and had denied another contempt motion. In light of newly discovered facts and other reasons discussed below, the court is vacating its orders denying the contempt motions and concludes that Respondents' post-discharge acts against Debtor, including prosecution of a breach of contract action based on her

1 purported failure to pay certain litigation expenses, violated the
2 discharge injunction.

3 In response to the earlier contempt motions, Respondents
4 argued that because the Debtor had entered into a post-petition
5 agreement to pursue the litigation and pay such expenses, her
6 purported obligations to them were not subject to the discharge
7 injunction. The court therefore denied a 2015 contempt motion
8 against Respondents on the grounds that Debtor had voluntarily
9 opted to continue litigation against her insurers and thus no
10 violation of the discharge injunction had occurred. Since that
11 ruling, however, a state court has entered a judgment declaring
12 that the post-petition litigation agreement is void and
13 unenforceable on the grounds of coercion and intimidation.
14 Moreover, Nordeman swore in his state court testimony that the
15 post-petition agreement was a "reinforcement" of and "essentially
16 the same" as a pre-petition agreement executed by Debtor. In
17 other words, it is an unenforceable reaffirmation agreement.

18 In light of these new developments and for the reasons set
19 forth below, the motion for reconsideration is GRANTED and the
20 court will set a hearing for determination of damages incurred by
21 Debtor as a result of Respondents' conduct.

22
23 I. THE VARIOUS AGREEMENTS¹

24 Debtor filed this chapter 7 case on May 29, 2012, and
25 received her discharge on October 16, 2012. Previously, in 2010,
26 Debtor had suffered a fire at her home. She retained Montgomery

27
28 ¹The following discussion constitutes the court's findings of
fact and conclusions of law. Fed. R. Bankr. P. 7052(a).

1 Sansome to make repairs, and Nordeman had her sign a document
2 giving him authority to represent her with respect to her claim
3 against the insurer. The insurer refused to approve or authorize
4 the repairs suggested by Montgomery Sansome but Montgomery Sansome
5 nonetheless commenced the work. When the insurer refused to pay
6 the alleged cost of services provided, Montgomery Sansome demanded
7 an appraisal hearing to determine the value of its services.²

8 On January 5, 2011, Debtor signed a litigation agreement
9 (dated December 29, 2010) with Nordeman in which she agreed to
10 forward all proceeds recovered by her from her insurer to him and
11 to pay the litigation costs "from her other insurance proceeds to
12 which she may otherwise be entitled under her contents replacement
13 or cleaning and repairing [sic]." Under this agreement (the
14 "First Litigation Agreement"), Respondents agreed "not to lien the
15 property or pursue[] legal actions against [Debtor] for
16 services and materials provided." Montgomery Sansome also
17 promised to accept the results of any "appraisal hearing" as
18 settlement for the work it had performed.³ See First Litigation
19 Agreement appended as Exhibit A-1 to the Further Declaration of
20 Thomas M. Harrelson in Support of Debtor's Motion for
21 Reconsideration Regarding Post Discharge Injunction Sanctions

22
23 ²At the appraisal hearing against Debtor's insurer,
24 Montgomery Sansome sought more than \$200,000 in additional costs
25 for repairs to the garage and laundry room. The arbitrators
awarded only \$78,683.37 in compensation, and Montgomery Sansome
received all but approximately \$3,000.00 of that amount.

26 ³This agreement uses the term "appraisal hearing" and
27 "arbitration" interchangeably. For example, the third paragraph
28 states: "Leonard Nordeman agrees to fund the cost of arbitration
up front in order that the matter is appropriately heard at the
appraisal hearing."

1 (Docket No. 67).

2 Following the insurer's rejection of the claims submitted
3 by Nordeman and Montgomery Sansome, Debtor signed another
4 agreement drafted by Nordeman in which she authorized Montgomery
5 Sansome to pursue bad faith litigation against the insurer.
6 Debtor was entitled to retain 25% of the net proceeds and
7 Montgomery Sansome agreed to "finance the litigation including
8 legal fees, filing costs, expert witnesses, etc." with costs
9 deducted from any recovery before the 75-25 percentage split.
10 See Assignment of Litigation Rights and Benefits executed by
11 Debtor on January 13, 2012, attached as Exhibit B to the
12 Declaration of Thomas M. Harrelson [Docket No. 63] ("Second
13 Litigation Agreement"). A clearer but unsigned version of the
14 Second Litigation Agreement is attached as Exhibit A-2 to the
15 Further Declaration of Thomas M. Harrelson [Docket No. 67-1].
16 Notably, neither Nordeman nor Montgomery Sansome produced or
17 acknowledged this document when presenting their defenses to
18 Debtor's prior contempt motions.

19 In September 2012, Debtor signed yet another litigation
20 agreement with Respondents (the "Third Litigation Agreement").⁴
21 In light of this post-petition litigation agreement, the court
22 held that Respondents had not violated the discharge injunction as
23 Debtor had "re-entered the fray." Consequently, this court did
24 not stay the Respondents' state court breach of contract

25
26 ⁴ In her first request for production of documents from
27 Montgomery Sansome, Debtor sought "[a]ny and all documents
28 regarding the business transactions between [it and her] for the
period from January 1, 2010 to the present." In a response dated
November 4, 2014, Montgomery Sansome stated that there are at
least five contracts between it and Debtor.

1 litigation with respect to the Third Litigation Agreement.
2 Subsequent events demonstrate that the court erred in making this
3 determination, including: (1) the state court's adjudication that
4 the Third Litigation Agreement was void and unenforceable, as
5 Nordeman obtained Debtor's consent through coercion and threats,
6 (2) Nordeman's admissions under oath that the Third Litigation
7 Agreement was a "reinforcement" agreement and was "essentially the
8 same" as the pre-petition agreements, (3) Nordeman's additional
9 admission under oath that he had his attorney meet with Debtor
10 post-petition (September 2012) to "get one [another agreement] to
11 replace it [a pre-petition agreement]. If I'm going to move
12 forward, then I probably got to have some written agreement so I
13 can move forward with something in writing [sic]." In other
14 words, the Third Litigation Agreement was -- as Debtor argued in
15 her prior contempt motions -- an unenforceable and void
16 reaffirmation agreement. See Transcript attached to Declaration
17 of Thomas M. Harrelson filed on May 24, 2016 at Docket No. 54; see
18 also Order of Judgment on Motion Pursuant to C.C.P. § 631.8
19 entered on January 7, 2016, attached as Exhibit A to Mr.
20 Harrelson's May 24 declaration (Docket No. 54).

21
22 II. THE POST-DISCHARGE LITIGATION AGAINST DEBTOR

23 Almost two years after the petition date and approximately
24 sixteen months after Debtor received her discharge, Montgomery
25 Sansome filed a state court complaint against her for (1) breach
26 of contract and (2) common counts. In particular, Montgomery
27 Sansome wanted to recover from Debtor the amounts it initially
28 attempted to obtain from the insurance company (which had rejected

1 those amounts), contending that Debtor had breached the Third
2 Litigation Agreement. Debtor sought an order of contempt against
3 Respondents for violating the discharge injunction.

4 By order entered on February 2, 2015, this court granted
5 Debtor's motion in part, finding Montgomery Sansome "in contempt
6 of court having violated the discharge injunction by its
7 prosecution in [the common counts cause of action] of any
8 liability arising out of facts that predate [Debtor's] bankruptcy
9 filed on May 29, 2012. Any contracts signed prior to that date
10 have been discharged by Movant's bankruptcy." This court also
11 denied the contempt motion in part, finding that Montgomery
12 Sansome's cause of action for enforcement of a "litigation
13 agreement" purportedly signed by Debtor post-petition did not
14 violate the discharge injunction.

15 Several months later (in May 2015), notwithstanding the
16 court's finding that Respondent's prosecution of causes of actions
17 predating the petition date constituted contempt, Montgomery
18 Sansome filed an amended state court complaint that included a
19 claim for \$3,752.84, representing the small amount of funds
20 retained by Debtor following the pre-petition arbitration award in
21 her favor. Montgomery Sansome, having received \$75,683.37 from
22 that particular award, contended that it was entitled to the full
23 amount. It also sought damages based on Debtor's purported
24 failure to cooperate in the prosecution of pre-petition claims
25 against the insurer. Debtor filed a second contempt motion, and
26 Respondents argued that the claim reflected damages arising from
27 the post-petition breach of the pre-petition agreement. This
28 court concluded that to the extent the debtor had signed the post-

1 petition litigation agreement, she had assumed new obligations to
2 Respondents and debts arising from the Third Litigation Agreement
3 were thus not subject to the discharge injunction.

4 After that ruling, a seven-day trial proceeded in state
5 court. The state court entered judgment in favor of Plaintiff,
6 finding that (1) no "valid and enforceable contract was ever
7 formed between" Debtor and Montgomery Sansome with respect to any
8 litigation agreement; (2) that Montgomery Sansome commenced
9 unsuccessful bad faith litigation against insurer without the
10 consent and knowledge of Debtor; (3) that even if the litigation
11 agreement were valid, Debtor's consent was procured through
12 threats, intimidation and undue influence; (4) even if the
13 litigation agreement were valid, it was procedurally and
14 substantively unconscionable pursuant to California Civil Code
15 section 1670.5; and (5) the litigation agreement was invalid as it
16 violated the California Insurance Code. See State Court "Order of
17 Judgment on Motion Pursuant to C.C.P. § 631.8" appended to
18 Debtor's Motion for Reconsideration at Docket No. 53 at pages 15-
19 18.

20 21 III. RULING

22 As the state court concluded that the debtor's consent to
23 purported litigation agreement was procured through threats,
24 intimidation and undue influence, this court erred in finding that
25 Debtor had voluntarily "re-entered the fray." Grounds for relief
26 from that finding and from the court's order denial of contempt
27 sanctions for conduct related to that purported litigation
28 agreement exist under Fed. R. Bankr. P. 9024 (incorporating Fed.

1 R. Civ. P. 60(b)(2), (3), (4), and (6)). Furthermore, Nordeman's
2 admission during the state court trial that the post-petition
3 Third Litigation Agreement was a "reinforcement" agreement and was
4 "essentially the same" as the pre-petition agreements demonstrates
5 that the Third Litigation Agreement was simply an unenforceable
6 reaffirmation of the prepetition obligations. For those reasons,
7 the court concludes that Respondents' post-discharge conduct did
8 violate the discharge injunction and will vacate its prior orders
9 to the contrary.

10 Counsel for Debtor should upload an order vacating the
11 court's order dated June 1, 2015, and comply with B.L.R. 9021-1(c)
12 in doing so. In addition, no later than August 26, 2016, Debtor
13 should file a declaration setting forth the costs and fees
14 incurred by her in defending the state court action, as well as
15 any other damages arising from the violation of the discharge
16 injunction. Respondents should file their opposition, if any, no
17 later than September 9, 2016. The opposition shall be limited to
18 arguments regarding the amount of damages and shall not re-visit
19 the issues of whether Respondents' actions violated the discharge
20 injunction. The court will then notify the parties if a further
21 hearing or status conference is necessary or whether the matter is
22 taken under submission.

23 ***** END OF MEMORANDUM DECISION *****
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